

2006

Pamela A. Lamano v. Brian C. Lamano : Reply Brief

Utah Court of Appeals

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BEFORE THE UTAH COURT OF APPEALS

PAMELA A. LAMANO,

Petitioner/Appellee,

vs.

BRIAN C. LAMANO,

Respondent/Appellant.

Appeal No. 20060899-CA

On Appeal From the Judgment and Order of the Second District Court, Bountiful
Department, the Honorable Glen R. Dawson presiding.

Reply Brief of Appellant

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Argument

I. Petitioner's Position Concerning the Property Division Is Unsupported By the Law and the Record.

In the decree of divorce, executed by the trial court, the court expressly adopted the stipulation of the parties as to how the Delta Family Care Retirement Plan would be divided. (Decree, at ¶¶36, attached as Exhibit B to Respondent's Initial Brief.) Petitioner now claims that the only stipulation or agreement was with regards to a "T-Mobile" account, as opposed to a retirement account with Delta, notwithstanding the express language of the divorce decree. Under Petitioner's reasoning because the retirement plan discovered was supposedly from another a company, there was no agreement. To the contrary, as Petitioner acknowledges in her brief, her counsel expressly said a credit would be given as an off-set if *any* account were found. (Br. of Appellee at 15; R. at 1020.)(Italics added.) The error in Petitioner's reasoning is further reflected in the decree and findings of the district court, which both referred to "retirement with Delta Airlines, T-Mobile." (Decree, at ¶¶36; Findings, at ¶¶72, attached as Exhibits B and C to Respondent's Initial Brief.) Even while attempting to reverse her position on how the account should be treated, Petitioner never claimed to the trial court that the newly discovered account was anything other than that anticipated by the parties' stipulation. Now that the case has reached this Court, Petitioner for the first time claims that the account discovered is outside of the scope of the agreement.

To the contrary, the trial court's original decree and findings were plain in outlining and adopting the stipulation regarding the retirement plan. That the district court would sign these documents adopting the stipulation after the hearing, expressly changing course, is virtually conclusive evidence of the court's abuse of discretion.

II. The District Court's Findings Were Insufficient.

The district court awarded Respondent only a future occurring Woodward share without making adequate factual findings. As outlined in Respondent's opening brief, Woodward v. Woodward, 656 P.2d 431 (Utah 1982), and its progeny set forth specific considerations which should be considered by a trial court in determining how and when to divide retirement benefits between divorcing parties. While Petitioner speculates as to the considerations bearing on the trial court's ultimate determination that distribution of the Delta Family Care Retirement Plan should be delayed, the trial court took no evidence and Petitioner proffered no evidence. There is nothing but unsupported speculation by Petitioner's counsel and the trial court about the validity of expert opinion proffered by Respondent.

It is clear that the trial court's on-the-record speculation as to the divisibility of the retirement plan, without any evidentiary foundation is insufficient. In Gardner v. Gardner, 748 P.2d 1076 (Utah 1988), the Utah Supreme Court stated:

“Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are ‘clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.’ ... The findings of fact must show that the court’s judgment or decree ‘follows logically from, and is supported by, the evidence.’ The findings ‘should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.’”

Id. at 1078, citing, Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987)(Internal citations omitted.) It is clear that the trial court should have set forth in findings of fact the factual basis for its conclusion that the Delta Family Care Retirement Plan had no present value and could not be divided along with the rest of the marital property as the parties had anticipated, had agreed to do, and as the district court had done with all of the other retirement accounts.

In this case, the only evidence that was proffered to the trial court established just the opposite, namely that the plan had an ascertainable present value. However, the trial court did not take evidence in this regard and made no oral or written findings. The Supplemental Decree of Divorce summarily concluded, “that the Respondent be awarded his Woodward share of the Petitioner’s defined benefit pension plan known as the Delta Family-Care Retirement Plan through Delta Air Lines, Inc. ...” The trial court abused its discretion in refusing to take evidence in this regard, ignoring the only evidence proffered in this regard, and granting Respondent only a future Woodward share rather than a present share in the plan without any evidentiary support. Indeed, in her brief, Petitioner offers no substantive analysis of Woodward and its

progeny to support a contrary assertion. The decision of the district court should be reversed.

III. Petitioner's Arguments Are Barred By Judicial Estoppel.

In response to Respondent's contention that Petitioner's change in position should be barred by the doctrine of judicial estoppel, Petitioner argues that the doctrine can not apply, claiming there was no prior judicial proceeding. Under Petitioner's reasoning, the trial and each subsequent hearing is all part and parcel of the same judicial proceeding. Petitioner cites no authority to support this proposition.

Petitioner's claim is contrary to both caselaw and scholarly commentary on the subject. While Respondent's research revealed no Utah caselaw addressing this issue, as a general rule:

The principle, rule, or doctrine of estoppel to assume inconsistent positions in legal proceedings applies generally to positions assumed not only in the course of the same action or proceeding, but also to proceedings supplemental thereto including proceedings for review or re-trial...

31 C.J.S. Estoppel § 138 (2007). In like manner, the United States Supreme Court has stated, "Judicial estoppel 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" New Hampshire v. Maine, 532 US 742, 749 (2001), citing, Pegram v. Hedrich, 530 US 211, 227 n.8 (2000). Several sister states have come to the same conclusion. See, e.g., Bank of Wichita v.

Ledford, 151 P.3d 103, 112 (Okla. 2006)(judicial estoppel applies to inconsistent positions taken in the course of the same judicial proceeding) Jackson v. County of Los Angeles, 70 Cal. Rptr. 2d 96, 101-02 (Cal. App. 1997)(judicial estoppel applies to positions taken “in the same or some earlier proceeding”); Cummings v. Bahr, 685 A.2d 60, 66 (N.J. Sup. Ct. App. Div. 1996)(judicial estoppel is “equally applicable where a litigant asserts inconsistent legal positions in different proceedings in the same litigation.”)

In this case, Petitioner affirmatively represented to the district court in one hearing or proceeding that there was no retirement account in order to obtain a benefit for herself and that if one were discovered, Respondent should be awarded a credit as an off-set to the property division. Petitioner successfully maintained her prior position in that the court issued its oral and written findings, awarding Petitioner a large cash property distribution and requiring Respondent to refinance his assets to meet his obligation. Respondent relied on the prior position by resting with the parties’ stipulation and accepting the courts’ promised off-set or judgment. However, as soon as the evidence was uncovered to prove Petitioner’s representations false, Petitioner sought to avoid the effect of her prior stipulation and representations. Under these circumstances, the elements of judicial estoppel are met. Petitioner should be estopped from requesting separate treatment for the Delta Family Care Retirement Plan.

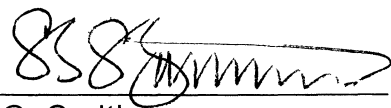
Conclusion

For the reasons set forth herein and those in Respondent's opening brief, the district court abused its discretion in awarding Respondent only a Woodward share in the Delta Family Care Retirement Plan and in failing to implement the parties' stipulation. The district court further erred in allowing Petitioner to switch its position under the doctrine of judicial estoppel. Respondent respectfully requests that this Court reverse the determination of the district court and remand the case with instructions to determine the present cash value of the Delta Family Care Retirement Plan and to equitably divide the plan immediately.

Respondent requests oral arguments.

DATED this 12 day of June, 2007.

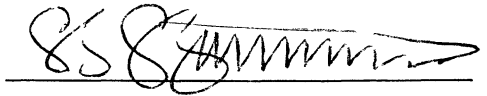
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Certificate of Mailing

I hereby certify that on this 12 day of June, 2007, I mailed, postage prepaid, two true and correct copies of the foregoing Reply Brief of Appellant, to the following individuals:

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A handwritten signature in black ink, appearing to read "Jon J. Bunderson", written over a horizontal line.